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NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN SERAVALLI, JR.
JOSEPH SERAVALLI,
Petitioners,

V.

STATE OF CONNECTICUT,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT**

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April 7, 1983

QUESTION PRESENTED

Whether The Fifth And Fourteenth Amendments Bar Refusal To Hear A Defendant's Double Jeopardy Claim, Based On Insufficiency Of Evidence At A Trial Ending In A Mistrial, Until His Conviction And Appeal Following A Second Trial.

LIST OF PARTIES

This petition is jointly presented by John Seravalli and by Joseph Seravalli, Jr. The petition concerns *State v. John Seravalli, Jr.* and *State v. Joseph Seravalli*, cases consolidated at trial and on appeal to the Connecticut Supreme Court, where they were Docket Number 10297 and 10298. Since the appeals presented identical issues, they were treated as one in that court's opinion. App. A-2, n.1. For these reasons, John Seravalli, Jr. and Joseph Seravalli petition jointly under Sup. Ct. R. 19.4.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT**

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court appears in 189 Conn. 201, ____ A.2d ____ (1982), and is reprinted as Appendix A.

JURISDICTION

The decision of the Connecticut Supreme Court was rendered on Feb. 8, 1983. This petition was filed within 60 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1257. *See Harris v. Washington*, 404 U.S. 55, 56 (1971).

CONSTITUTIONAL PROVISIONS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. 5.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. 14.

STATEMENT OF THE CASE

This petition arises out of the Connecticut Supreme Court's dismissal of the appeals of John Seravalli, Jr. and Joseph Seravalli. The Seravallis appealed to that court from denial of their motion for acquittal on conspiracy and related charges after a hung jury prompted the trial court to grant their motion for a mistrial. The petitioners argued to the trial court that retrial would violate their constitutional right against double jeopardy. *See* Motion for Judgment of Acquittal, July 8, 1980 (excerpt), App. B-1; Memorandum of Decision of Superior Court, Dorsey, J., Nov. 10, 1980 (excerpt), App. C-1. This argument was made in the petitioners' statement of issues on appeal. *See* App. A-2 n.4. The Connecticut Supreme Court granted the State's preliminary motion to dismiss all but the double jeopardy issues. *See* App. A-4 n.5.

The Seravallis then briefed and argued on appeal their contention that where a mistrial results from a hung jury after the state has introduced too little evidence to convict, a judgment of acquittal must be granted since retrial would violate the constitutional protection against double jeopardy. App. A-8-9. The Connecticut Supreme Court on Feb. 8, 1983 dismissed the appeal. The majority, Justices Parskey, Shea and Grillo and Chief Justice Speziale, held that because petitioners' assertion of the right not to be tried again could not be decided without reviewing the evidence at the first trial, the court had no appellate jurisdiction until defendants had been convicted and appealed after the second trial. *See* App. A-11. Justice Ellen Peters dissented, pointedly observing that the court, by refusing to hear the petitioners' constitutional claim, had destroyed it by placing them twice in jeopardy. *See* App. A-12-13.

REASONS FOR GRANTING THE WRIT

THE FIFTH AND FOURTEENTH AMENDMENTS BAR REFUSAL TO HEAR A DEFENDANT'S DOUBLE JEOPARDY CLAIM, BASED ON INSUFFICIENCY OF EVIDENCE AT A TRIAL ENDING IN A MISTRIAL, UNTIL HIS CONVICTION AND APPEAL FOLLOWING A SECOND TRIAL.

I. The Petitioners' Claim That Double Jeopardy Prohibits Their Retrial Due To Insufficiency Of Evidence At Their First Trial Is A Paradigmatic Appealable Order Under The Decisions Of This Court.

This Court has repeatedly stated that the Double Jeopardy Clause protects defendants, "'not against being twice punished, but against being twice *put* in jeopardy...'. . . . The 'twice put in jeopardy' language of the constitution thus relates to a potential, i.e., the risk that an accused will be convicted of the 'same offense' for which he was initially tried." *Price v. Georgia*, 398 U.S. 323, 326 (1970) (emphasis in original), *quoted in Abney v. United States*, 431 U.S. 651, 661 (1977). The guarantee is against the anxiety of retrial and the risk of being twice convicted, by chance or because the prosecution has improved its case. *Abney*, 431 U.S. at 661-62; *United States v. DiFrancesco*, 449 U.S. 117, 128-31 (1980).

Abney v. United States relied on this aspect of the Double Jeopardy Clause in holding that a pretrial order denying a motion to dismiss on double jeopardy grounds was an immediately appealable collateral order. 431 U.S. at 657-62. *Abney* applied the three part test of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). First, because the order was a complete, formal, and, in the trial court, final rejection of the defendants' double jeopardy claims, it fully disposed of the question at issue. 431 U.S. at 659. Second, because the defendants were not arguing guilt or innocence, but rather the right of the prosecution to subject them to another trial, the order was collateral, not a step towards final disposition on the merits

that would be merged in the judgment and reviewed on appeal. 431 U.S. at 600. The third and most significant test was that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. . . . It is a guarantee against twice being put to *trial* for the same offense." 431 U.S. at 600-01 (emphasis added and footnote omitted). Indeed, as this court later noted in *United States v. MacDonald*, 435 U.S. 850, 859 (1978), acquittal on retrial would not eliminate the defendants' grievance at being put twice in jeopardy.

The petitioners presented a paradigmatic double jeopardy claim in their interlocutory appeal of the trial court's refusal to grant their motion for acquittal, presented after jury deadlock and mistrial, based on insufficiency of the evidence. In *Burks v. United States*, 437 U.S. 1 (1978), this Court held that the Double Jeopardy Clause prohibits a second trial when a reviewing court holds that the prosecution had insufficient evidence to convict after the first trial. *Id.* at 11; *accord*, *Tibbs v. Florida*, ___ U.S. ___, 102 S.Ct. 2211 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 43 (1981); *Green v. Massey*, 437 U.S. 19, 24 (1978). A finding by either the trial court or the reviewing court that the prosecution failed after a full trial to present sufficient evidence to convict is equivalent to a jury verdict of acquittal. *Burks*, 437 U.S. at 16. Such a finding absolutely prohibits retrial. *United States v. DiFrancesco*, 449 U.S. at 129.

The *Abney* and *Burks* holdings, taken together, make the trial court's failure to grant the petitioners' motion for acquittal after mistrial an appealable collateral order. Under *Burks* the claimed insufficiency of evidence raises a double jeopardy claim, and under *Abney* such claims are appealable.

II. The Connecticut Supreme Court Destroyed The Petitioners' Double Jeopardy Rights By Refusing To Hear Their Appeal.

The Connecticut Supreme Court refused to hear the petitioners' double jeopardy claim on the ground that examination

for any purpose of the evidence at a trial in which a mistrial was declared at the defendants' request would be a decision on the merits reviewable after a final judgment or retrial, not a collateral order within *Cohen v. Beneficial Industrial Loan Corp.* See App. A-9. The court concluded that any review of the petitioners' admittedly colorable claim under *Burks*, see App. A-9-10 and n.8; App. A-12 (Peters, J., dissenting), would have to come *after* conviction on their second trial. App. A-9-10.

The Connecticut Supreme Court has completely misunderstood *Abney*. A double jeopardy claims is an almost unique paradigm of the appealable interlocutory order because it involves a distinct collateral issue — whether the defendant may be tried again — which must, by its own nature, be decided before retrial. See *MacDonald*, 435 U.S. at 853-61. The Connecticut Supreme Court did not see that the nature of such a claim is collateral. It confused the task of the reviewing court under *Burks* with normal appellate review of trial error in saying that the task of reviewing evidence is automatically consideration of the merits. This view ignores the difference in scope and purpose of the two procedures. See *United States v. McQuilkin*, 673 F.2d 681, 685 (3d Cir. 1982); *United States v. United States Gypsum Co.*, 600 F.2d 414, 416 (3d Cir.), 444 U.S. 884 (1970); *contra* App. A-11, n. 9 (citing cases). The court's insistence that any review would have to be on the merits also led it to believe that a mistrial, which would delay consideration of the merits until appeal after retrial, prevented the double jeopardy appeal. The distinction is immaterial, since the case against the petitioners was the same, whether they were convicted or a mistrial was declared due to a hung jury.

This general misunderstanding of the nature of a collateral order led to a much larger error. The Connecticut Supreme Court, driven by its feeling that all evidentiary claims merged with the merits, declared that petitioners could appeal their double jeopardy claim only after conviction on retrial. The court ignored the fact, pointed out by Justice Peters in dissent, that it destroyed the petitioners' constitutional claims by refusing to review them. App. A-12.

This result is intolerable. In the first place, it violates the petitioners' Fifth Amendment rights. See *Green v. Ohio*, 455 U.S. 976, 978 (1982) (White, J., Blackmun, J. and Powell, J., dissenting from denial of writ of certiorari) (*Abney* not limited to federal cases); *Spradling v. Texas*, 455 U.S. 971, 973 (1982) (Brennan, J. and Marshall, J., dissenting from denial of writ of certiorari) (*Abney* has constitutional dimension and applies to the states). *Mathews v. Eldridge*, 424 U.S. 319 (1975) noted the "core principle that statutorily created finality requirements should it, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered. . . ." *Id.* at 331 n.11.

The decision not only violates the petitioners' substantive rights, but is arbitrary and irrational. Why should the petitioners be put in jeopardy twice because one or more jurors recognized that there was too little evidence and refused to convict, when if they had been convicted they could have appealed and under *Burks* received complete freedom from retrial? The decision thus violated petitioners' rights to due process and equal protection. Arbitrary denial of appellate review violates the Equal Protection Clause. See *Douglas v. California*, 372 U.S. 353, 357-58 (1963). The right to be heard at a meaningful time before suffering a grievous loss is an element of due process. See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The decision of the Connecticut Supreme Court has arbitrarily deprived the petitioners of their constitutional rights and must be reversed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

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APPENDIX

APPENDIX A

State of Connecticut v. John Seravalli, Jr.
State of Connecticut v. Joseph Seravalli
(10297)
(10298)

Speziale, C. J., Peters, Parskey, Shea and Grillo, Js.

(One judge dissenting)

Argued November 9, 1982 — decision released February 8, 1983

Information charging the defendants with the crimes of conspiracy to commit arson in the second degree, arson in the second degree, and larceny in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Dorsey, J.*; following a mistrial, the defendants filed a motion for judgment of acquittal, which was denied by the court, and the defendants appealed to this court. Appeals dismissed.

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J. Daniel Sagarin, with whom, on the brief, were *William Barnes* and *Nancy Sobocinski*, for the appellants (defendants).

Carl Schuman, assistant state's attorney, with whom, on the brief, were *Arnold Markle*, state's attorney, and *Mary Galvin*, assistant state's attorney, for the appellee (state).

Speziale, C. J. These appeals were brought following a mistrial granted by the trial court at the defendants'¹ request when the jury before which they were tried on conspiracy to commit arson, arson, and larceny charges² became deadlocked. The defendants' appeal raises only two substantial issues³: (1) that the evidence was insufficient to convict them on any of the charges; and (2) that the trial court's denial of their motion for judgment of acquittal placed the defendants twice in jeopardy in violation of the state and federal constitutions.⁴

¹The cases of *State v. John Seravalli, Jr.* (docket no. 10297), and *State v. Joseph Seravalli* (docket no. 10298), were consolidated both for trial and on appeal to this court. We will refer to them as a single appeal in this opinion.

²Each defendant was charged by information with violations of (1) conspiracy to commit arson in the second degree, General Statutes §§ 53a-48 and 53a-112 (a) (1) (B); (2) arson in the second degree, General Statutes § 53a-112 (a) (1) (B); and (3) larceny in the first degree, General Statutes § 53a-122 (a) (2).

³The defendants also presented a claim in their brief that the larceny count should have been dismissed because the larceny statute did not apply to the facts of this case. This issue is not properly before us, for the reasons hereinafter set forth.

⁴Each defendant's preliminary statement of issues reads as follows:

"Preliminary Statement of the Issues

"1. Did the trial court err in denying the Defendant's Motion for Judgment of Acquittal.

"2. Did the trial court err in concluding there was sufficient evidence to find the Defendant guilty beyond a reasonable doubt on Count One of the Information.

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On October 7, 1980, this court granted the state's motion to dismiss the appeals "except as to the defendant[s'] double jeop-

"3. Did the trial court err in concluding there was sufficient evidence to find the Defendant guilty beyond a reasonable doubt on Count Two of the information.

"4. Did the trial court err in concluding that there was sufficient evidence to find the Defendant guilty beyond a reasonable doubt on Count Three of the Information.

"5. Does the trial court's denial of Defendant's Motion For Judgment of Acquittal place the Defendant in jeopardy twice in violation of his state and federal constitutional rights."

Issues 2, 3, and 4 clearly address only sufficiency of the evidence. Issue 1 concerns the motion for judgment of acquittal which combined two parts:

"(1) The evidence would not permit a finding of guilty beyond a reasonable doubt on any of the charges against the Defendant.

"(2) The first trial was so lengthy and expensive that to permit a second trial would be fundamentally unfair, unconsiderable, [sic] and amount to the imposition of a punishment of itself."

The first part of the motion also concerns only the sufficiency of the evidence, while the second part is the original basis for the defendants' double jeopardy claim. Issue number five specifically raises the double jeopardy claim concerning the second part of the motion.

ardy claim.”⁵ Of the issues stated, only the double jeopardy issue was immediately appealable to this court. *State v. Powell*, 186 Conn. 547, 552-53, 442 A.2d 939, cert. denied sub nom *Moeller v. Connecticut*, U.S.

⁵“No. 10297

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VS. : STATE OF CONNECTICUT
JOHN SERAVALLI, JR. : OCTOBER 7, 1980

ORDER

The motion of the State to dismiss the appeal of the defendant having been heard by the Court, it is hereby

ORDERED by the Supreme Court, that said motion be and the same is hereby GRANTED, except as to the defendant's claim of double jeopardy.

By the Court,

/s/ Donald H. Dowling
CHIEF CLERK”

An identical order was made in No. 10298, *State of Connecticut v. Joseph Seravalli*.

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, 103 S. Ct. 85, L. Ed. 2d (1982); *State v. Moeller*, 178 Conn. 67, 420 A.2d 1153, cert. denied, 444 U.S. 950, 100 S. Ct. 423, 62 L. Ed. 2d 320 (1979).

The double jeopardy aspect of the defendants' motions for acquittal before the trial court was that "[t]he first trial was so lengthy and expensive that to permit a second trial would be fundamentally unfair, unconsiderable [sic], and amount to the imposition of a punishment of itself." On appeal, following our dismissal of the appeal on the issues concerning sufficiency of the evidence, the defendants' original double jeopardy claim changed. The argument now presented by the defendants on appeal is that because there was insufficient evidence to convict, the double jeopardy clause bars a second trial of the defendants even though they requested the mistrial.

We recognize that this change in the argument by the defendants is an attempt to resurrect the appeal of the issues concerning sufficiency of the evidence in the guise of a double jeopardy claim; we will, nevertheless, address the appealability of the issue now raised by the defendants rather than rely solely on our previous ruling on the state's motion to dismiss.

Appeals are permitted only from final judgments. *State v. Powell*, supra, 550. "The finality requirement underlying our appellate review represents a clear and firm policy against piecemeal appeals. *State v. Kemp*, 124 Conn. 639, 646-47, 1 A.2d 761 (1938)." *State v. Powell*, supra, 551. "Adherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are

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especially inimical to the effective and fair administration of the criminal law.' *DiBelli v. United States*, 369 U.S. 121, 126, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962)]." *Abney v. United States*, 431 U.S. 651, 657, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), quoted in *State v. Powell*, supra, 551.

The appealable final judgment in a criminal case is ordinarily the imposition of sentence; *State v. Grotton*, 180 Conn. 290, 293, 429 A.2d 871 (1980); but we have held that certain presentence orders or actions by a trial court may be considered final for purposes of appeal "where the otherwise interlocutory ruling challenged on appeal cannot, if erroneous, later be remedied by suppression of the evidence or reversal of the conviction after trial." *State v. Grotton*, supra, 293; *State v. Powell*, supra, 553; see *State v. Spendolini*, 189 Conn. 92, A.2d (1982), and cases cited therein.

In *Abney v. United States*, supra, the United States Supreme Court permitted an appeal from the denial of a motion to dismiss the indictment which was based on a claim of double jeopardy. The court held that denial of the motion was a "collateral order" as defined in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), and was a final decision under 28 U.S.C. § 1291, the federal appeal statute. In *Cohen*, a shareholder's derivative suit, the district court denied the defendant's pretrial motion to require the plaintiffs to post a security bond. The court of appeals reversed, and the United States Supreme Court ruled that the appellate court had jurisdiction over the appeal, stating: "This decision appears to fall into that small class [of cases] which finally determine claims of rights *separable from, and collateral to*, rights asserted

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in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (Emphasis added.) *Cohen v. Beneficial Loan Corporation*, supra, 546.

In *Abney*, the court applied the *Cohen* test above to the double jeopardy claim raised in that case, and found that it was collateral: "[T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not [he] is guilty of the offense charged. . . . [T]he defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence. . . . Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charges against him. [Citations omitted.] The elements of that claim are completely independent of his guilt or innocence." *Abney v. United States*, supra, 659-60.⁶

The court in *Abney* realized that permitting interlocutory appeals of a claim of double jeopardy might lead to assertion of many new kinds of "double jeopardy" claims as a means of obtaining interlocutory review of noncollateral issues. The court therefore stressed the limited effect of its holding: The appealable issues, however labelled, "do not extend beyond the claim of former jeopardy

⁶This court, following *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2045, 52 L. Ed. 2d 651 (1977), has also permitted an interlocutory appeal based on double jeopardy claims. *State v. McKenna*, 188 Conn. 671, 672-75, A.2d (1982); *State v. Aillon*, 182 Conn. 124, 126, 438 A.2d 30 (1980), cert. denied, 449 U.S. 1090, 101 S. Ct. 883, 66 L. Ed. 2d 817 (1981); *State v. Moeller*, 178 Conn. 67, 68-69, 420 A.2d 1153, cert. denied, 444 U.S. 950, 100 S. Ct. 423, 62 L. Ed. 2d 320 (1979).

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and encompass other claims presented to, and rejected by the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence." *Abney v. United States*, supra, 663. The court therefore held that Abney's challenge to the sufficiency of the indictment was not immediately appealable because "it goes to the very heart of the issues to be resolved at the upcoming trial." *Id.*

In the present case, the double jeopardy aspect of the defendants' motions for acquittal before the trial court was that "[t]he first trial was so lengthy and expensive that to permit a second trial would be fundamentally unfair, unconsiderable [sic], and amount to the imposition of a punishment of itself." This issue was neither briefed nor argued before us, and is therefore considered abandoned. *State v. Nims*, 180 Conn. 589, 590, 430 A.2d 1306 (1980). This is not, however, the double jeopardy claim presented on appeal.

As previously noted, on October 7, 1980, this court granted the state's motion to dismiss the appeals "except as to the defendant[s'] claim of double jeopardy," thereby dismissing the issues concerning sufficiency of the evidence. See footnote 5, supra. Following that dismissal, the defendants' original double jeopardy claim changed. The only double jeopardy claim now presented by the

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defendants on this appeal is that when a mistrial is ordered because of a deadlocked jury, the double jeopardy clause bars retrial where there was insufficient evidence at trial to sustain a guilty verdict even though the defendants requested the mistrial.

This claim clearly "goes to the very heart of the issues to be resolved in the upcoming trial." *Abney v. United States*, supra, 663. It cannot possibly be considered "collateral" to the action under *Cohen* and *Abney*. The Fourth Circuit Court of Appeals stated the true nature of this type of appeal in dismissing an interlocutory appeal identical to this one: "In an effort to bring this case within the scope of *Abney*, [the defendant] has attempted to frame a completely non-collateral issue — the sufficiency of the evidence to convict him (as he has yet to be convicted, this goes directly to the merits of his case) — in terms of double jeopardy. . . . In essence, he seeks to have an appellate court decide his guilt or innocence and to perform a function properly left to the trial judge, that is, determining the sufficiency of the evidence to send the case to the jury. Merely because he has chosen to characterize the issue as one of double jeopardy, however, does not require this court to review it. . . ." *United States v. Ellis*, 646 F.2d 132, 134 (4th Cir. 1981).

We stress here that the only question before us is whether this appeal is to be permitted at this time. Unquestionably, the defendants have a right to challenge the sufficiency of the evidence in the first trial, if they are convicted after a second trial. *United States v. Wilkinson*, 601 F.2d 791 (5th Cir.

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1979).⁷ If the evidence is found to be insufficient on appeal, it is equally clear that they may not be retried thereafter. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).⁸ For purposes of this appeal, however, we are unwilling to extend the rule of *Cohen* to include *noncollateral* double jeopardy claims. "*Cohen* is a narrow exception, applicable to a 'small class' of claims that meet all, not merely some, of its factors. [*Cohen v. Beneficial Industrial Loan Corporation*, *supra*, 546.] The class that we contemplate here is not a small one. Rather, it comprises all criminal trials

⁷Although there is dictum in *United States v. Wilkinson*, 601 F.2d 791 (5th Cir. 1979), that a denial of a motion to dismiss on double jeopardy grounds is appealable after the first trial, this dictum was rejected by the same court in *United States v. Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980).

⁸Before this court, the defendants presented a superficially attractive argument on the basis of *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), and *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977). They correctly stated that had they been convicted at trial, and had that conviction been reversed on appeal for insufficiency of the evidence, no retrial would be possible. *Burks v. United States*, *supra*, 18. Why, they asked, should they be more likely to face retrial when they persuaded some jurors of the insufficiency of the evidence, thereby producing a hung jury, than they would have if they had convinced the jurors, were convicted, and then had an appellate court rule the evidence insufficient! The flaw in this argument is twofold. First, a refusal by a jury to convict does not necessarily mean that the evidence was insufficient to convict as a matter of law. If that were the case, no retrial would ever be possible after a hung jury. Second, in *Burks*, there was a conviction and a final judgment, followed by an appellate court finding that the evidence was insufficient to convict. In this case there has been no finding that the

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in which a motion to acquit for insufficiency of the evidence is made and denied. One of *Cohen's* factors is not present here. We therefore lack jurisdiction to consider this appeal which, though in form asserting former jeopardy, in fact raises only the denial of the motion to acquit." *United States v. Becton*, 632 F.2d 1294, 1297 (5th Cir. 1980).

We hold that the denial of the defendants' motion for judgment of acquittal based upon the insufficiency of the evidence following a mistrial because of a deadlocked jury is not appealable as a collateral order raising a claim of double jeopardy which would be entitled to treatment as a final judgment.⁹

The appeals are dismissed for lack of jurisdiction.

In this opinion Parskey, Shea and Grillo, Js., concurred.

evidence was insufficient. The only judicial determination of the issue, by the trial court in denying the motion for judgment of acquittal, was that the evidence was not insufficient. The defendants argue, in effect, that even one juror may confer jurisdiction on this court to review an interlocutory order by simply refusing to convict. Seen in this light, the proposition is without merit, and we reject it. See *United States v. Becton*, 632 F.2d 1294, 1295-96 (5th Cir. 1980), where the same argument was made and rejected.

⁹The defendants have cited no precedent which contradicts our holding in this case. Every case cited by the defendants concerns an appeal following a final judgment, i.e.: a conviction and sentence. The state, however, has cited several cases which considered the precise issue decided here, and in each of those cases, the court dismissed the appeals for lack of jurisdiction. *United States v. Ellis*, 646 F.2d 132 (4th Cir. 1981); *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980); *United States v. Carnes*, 618 F.2d 68 (9th Cir. 1980); *Rafferty v. Owens*, 82 A.D.2d 582, 442 N.Y.S.2d 571 (1981).

Peters, J. (dissenting). The majority opinion states that, upon conviction after a second trial, the defendants will have an adequate opportunity to challenge the sufficiency of the evidence in the first trial. If that challenge is successful, "they may not be retried thereafter." I infer that this language is intended to indicate that the conviction on the second trial must then be set aside, no mat-

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ter how much evidence of guilt was there adduced, because otherwise the double jeopardy claim could never be vindicated at all.

I have two difficulties with the approach taken by the majority. One is a minor, but practical, problem. It will not be easy, factually *or* analytically, on appeal after a second conviction, to raise the sufficiency of the evidence at the first trial. Arguably that minor difficulty should give way to the unquestionable undesirability of allocating scarce judicial resources to a full appeal after every mistrial. The second difficulty strikes me as insuperable, however. As we have only recently reiterated in *State v. Spendolini*, 189 Conn. 92, A.2d (1983), the constitutional protection against double jeopardy affords to a defendant "a right not to be tried." See *United States v. MacDonald*, 435 U.S. 850, 860n, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978); *Abney v. United States*, 431 U.S. 651, 659, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977); *Price v. Georgia*, 398 U.S. 323, 331, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970). A double jeopardy claim is entitled to adjudication before rather than after retrial. See *Abney v. United States*, *supra*. Since, as the majority opinion in this case concedes, the defendants have stated colorable double jeopardy claims under *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), I do not understand how the defendants can constitutionally be deprived of their right to be heard on these claims now. Vindication of their claims after

another trial can never restore to them their right not to be twice placed in jeopardy.

I therefore must dissent from the position that we have no jurisdiction to hear the defendants'

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double jeopardy claims on this appeal. Since the merits of their claims about the sufficiency of the evidence may reach this court at another time, I limit this dissent to the jurisdictional question.

APPENDIX B

**Transcript: Motion for Judgment of Acquittal
(July 8, 1980) (excerpt)**

MR. SAGARIN: If, Your Honor, please, this is the Defendant's motion for judgment of acquittal following a mistrial, pursuant to Sections 898 of the practice book, 900 of the practice book, and the Federal and the State Constitutions, primary grounds for the motion after this lengthy trial, which took about six weeks. That the evidence would not permit a finding of guilty beyond a reasonable doubt on any of the charges against the Defendant. And that the failure to grant the motion for judgment of acquittal would be so fundamentally unfair and amount to such a burden and expense on the Defendant's part, given the full and complete chance the State has had to prove its case. That it will violate the double jeopardy provisions of the State and the Federal Constitutions.

* * * *

As far as the second part of the argument is concerned, with respect to this lengthy trial, particularly in the circumstances where the State has several other cases pending against these Defendants. If they want to subject them to jeopardy on those charges, basically claiming insurance fraud, then the State ought to be required to go to trial on those charges, but on this charge where they've had the full chance to present the evidence before a jury, and to get a jury either to agree with it, or disagree with it. And where we think there's been a failure of proof or certain of proof, in such a conflicting state, that would not justify proof beyond a reasonable doubt. To subject these Defendants' to pay for substantial transcript, to be subject to another six week trial, to be subject to the publicity problems that this would raise, together with their other claims where really they're relaying on the same witnesses, would in our view amount to a violation of the double jeopardy provision of the Federal and State Constitutions, and would be so fundamentally unfair, that amount to a denial of due process itself.

THE COURT: All right. With regard to 22266, motion for judgment of acquittal, denied. In the file there's another motion for judgment of acquittal.

MR. SAGARIN: That's the same motion, Your Honor. We want to make sure it was filed within five days. And so we have one hand delivered over while the other is in the mail.

THE COURT: All right. I'll deny that one too. And what I have said with regard to that file is applicable to 22267.

MR. SAGARIN: Thank you, Your Honor, exception.

THE COURT: Exception is noted for the record.

APPENDIX C

**Memorandum of Decision, Dorsey, J.
(Nov. 10, 1980)**

MEMORANDUM OF DECISION

Defendant has filed as of June 26, 1980, a written motion for judgment of acquittal. The motion specifies two grounds which would permit the court to enter a judgment of acquittal:

1. The evidence would not permit a finding of guilty beyond a reasonable doubt on any of the charges against the defendant.
2. The first trial was so lengthy and expensive that to permit a second trial would be fundamentally unfair, unconsiderable and amount to the imposition of a punishment of itself.

The motion refers to Section 898 of the Practice Book. Section 898 refers to Section 886 which is entitled "Mistrial." Section 886 of the Practice Book contains no text. Section 887 of the Practice Book contains text authorizing the judicial authority to declare a mistrial for prejudice to the defendant. Section 888 of the Practice Book authorizes the judicial authority to declare a mistrial for prejudice to the State. Section 889 of the Practice Book authorizes the judicial authority to declare a mistrial in any case in which the jury is unable to reach a verdict.

The court declared a mistrial pursuant to Practice Book Section 889 in each of these cases after satisfying itself that the jury was unable to reach a verdict on any of the counts before them and after receiving a mistrial request from defendant.

During the trial, after the jury indicated it was deadlocked, the court then charged the jury in accordance with "Chip Smith." When the jury again indicated its inability to reach a verdict, the state's attorney requested that the court administer a second "Chip Smith" charge. Defense counsel opposed this request and unambiguously and expressly requested that the

court declare a mistrial because the jury was unable to reach a verdict. The state's attorney opposed defense counsel's request in an equally unambiguous manner.

The court refused to administer another "Chip Smith" charge and granted defendant's motion for mistrial because it believed that another "Chip Smith" charge would be unduly coercive. In reaching its decision, the court was satisfied that the jury was indeed deadlocked and that defense counsel was making an intelligent rational waiver of his client's rights to have this trial completed by this jury.

At the trial and at the hearing on these motions, defense counsel made no allegation of prosecutorial or judicial misconduct. Generally speaking, the double jeopardy clause does not stand in the way of re-prosecution where the defendant has requested the mistrial. *Lee v. United States*, 97 S. Ct. 2141 (1977); *United States v. Jorn*, 400 U.S. 470 (1970). The double jeopardy clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to substantial burdens imposed by multiple prosecutions. It bars retrials where bad faith conduct by judge or prosecutor threatens harassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. *Divans v. California*, 98 S. Ct. 1 (1977).

At the time of trial, defendant sought a mistrial and the State opposed it solely within the context of the deadlocked jury and without reference to governmental or judicial misconduct.

The defendant's first post-trial written ground for judgment of acquittal is that the evidence would not permit a finding of guilt beyond a reasonable doubt on any of the charges against the defendant. The court rejected this argument on two occasions during the course of the trial when raised pursuant to Practice Book Sections 884 and 885. The court's recollection of the evidence compels a denial of the motion on this ground.

The defendant's second written ground for acquittal is that the first trial was so lengthy and expensive that to permit a second trial would be fundamentally unfair, inconsiderate and amount to the imposition of punishment of itself. The language suggests a due process argument.

This reasoning was rejected by the Second Circuit in *United States v. Castellanos*, 478 F2d. 749 (2nd Cir.) as not being encompassed within the principles of *United States v. Perez*, 22 U.S. (9 Wheat.) 6 L. Ed. 165, which provides the guides for determining when trials should be discontinued. Our Supreme Court has recently affirmed these principles in *State of Connecticut v. Guillermo Aillon*, Vol. XLII, No. 7, p. 25, CLJ, Aug. 12, 1980. These principles compel a denial of defendant's motion on the second ground asserted by defendant.

/s/Donald Dorsey, J.

DONALD DORSEY, J.